73217-0

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Court of Appeals
Division I
State of Washington

NO. 73217-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAWN SULLIVAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Carol. A. Schapira, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to excuse a juror who knew the complaining witness.

2. The trial court erred in giving a first aggressor instruction.

3. The trial court erred in refusing to give Sullivan's proposed instruction that the force reasonably necessary increases with the number of persons against whom such force is used.

4. The prosecutor committed egregious and ill intentioned misconduct during closing argument.

5. In the unlikely event appellate costs become an issue in this appeal, this court should exercise its discretion and decline to impose them given that Sullivan is indigent and has no ability to pay them.

Issues Pertaining to Assignments of Error

1. When a sitting juror reveals potential bias because he recognizes the complaining witness during testimony and believes he had met the complaining witness, was friends on social media, and likely had mutual friends, does the trial court err in denying the defense's motion to excuse the juror for cause?

2. Did the trial court err in giving a first aggressor instruction where the initial act of aggression consisted of either words alone or a single continuing course of charged assaultive conduct?

3. Did the trial court err in refusing to give a proposed defense instruction that correctly stated that the amount of force reasonably necessary may vary with the number of assailants faced by the person claiming lawful use of force?

4. The prosecutor argued Dawn Marie Sullivan was not credible because her testimony was intended to deceive the jurors into believing she experienced an attempted sexual assault in order to gain their sympathy. However, no evidence adduced at trial indicated Sullivan believed she was the victim of an attempted sexual assault. Were the prosecutor's arguments flagrant and ill intentioned (and therefore incapable of being cured by instruction) because they improperly appealed to jurors' passions and prejudices and because they were based on evidence outside the record?

5. Under this court's current approach to appellate costs, any objection to such costs must be made prior to a decision on the merits and before the prevailing party is even known. Therefore, in the event this court erroneously affirms Sullivan's conviction, should this court exercise discretion in the decision terminating review by declining to impose appellate costs on Sullivan based on her indigence?

B. STATEMENT OF THE CASE

The State charged Sullivan with second degree assault with a deadly weapon for assaulting Christopher Bohannon on October 29, 2012 with a knife. CP 1. The State amended the information to include a second count of second degree assault against Robert Cessill and a third count of bail jumping. CP 9-10. The State requested dismissal of the second degree assault against Cessill before trial and agreed to sever the bail jumping charge. CP 11, 13; RP 10.

The trial proceeded solely on Sullivan's alleged second degree assault against Bohannon. However, the trial testimony disclosed three divergent versions of events.

Dawn Sullivan

Sullivan stated she began spending more time with Bohannon in October 2012 because he was helping her look for a new apartment and providing a telephone where Section 8 personnel could reach her. RP 397, 400-01. Sullivan stated that Bohannon was loud, angry, and intimidating, which made her anxious on several occasions. RP 403.

On the evening of October 29, 2012, Sullivan informed Bohannon that he was intimidating her by his angry behavior. RP 405. Sullivan left Bohannon's apartment to give Bohannon an opportunity to calm down. RP 405-06.

While out, Sullivan met and began speaking to Robert Cessill at a bus stop. RP 406. Sullivan thought Cessill was cute and thought Bohannon would think so too, so Sullivan decided to bring Cessill back to Bohannon's apartment. RP 407-08. Cessill, who was already drunk, continued drinking with Bohannon, and eventually passed out. RP 410.

After Cessill fell asleep, Sullivan and Bohannon were seated side-by-side on the couch when Sullivan asked to smoke Bohannon's marijuana. RP 410-11. Bohannon "was all super sassy, like, That's my medical pot." RP 411. Sullivan also had a medical marijuana prescription and explained to jurors that she could easily go to a dispensary to replace Bohannon's marijuana. RP 411. Sullivan told Bohannon he was being selfish, and Bohannon dramatically responded, "Oh, really? Oh, really?" RP 411. Sullivan then told Bohannon he was being "greedy, selfish, and controlling," at which point Bohannon "lost his mind. He got in my face and was screaming so loud at me that spit was getting in my face." RP 412. Bohannon yelled, "Get the F out," but Sullivan wanted to get Cessill because she "thought it would be rude, like really impolite and tacky to bring somebody to somebody's house and then just -- and leave." RP 413.

As Sullivan was attempting to rouse Cessill, Bohannon pounced on Sullivan, and both Sullivan and Bohannon began rolling around on the floor. RP 413-14. Sullivan did not see Cessill become involved in the physical

altercation but felt "two boys on top of me" and rolled around on the ground with both of them. RP 414-15. Sullivan stated, "I just know that I was getting hurt . . . . And I was scared and people were putting their hands on my body and holding me against my will for no reason." RP 415. Sullivan said she was terrified. RP 415.

Sullivan "wiggled out, jumped over the couch," knew knives were in the kitchen on a big magnet strip, and "grabbed the knife." RP 416. Sullivan stated she was scared and "needed to protect" herself; she also stated the knife was closer than the exit. RP 427. Bohannon grabbed Sullivan and got the knife away within seconds. RP 416, 428. Bohannon threw Sullivan out the door. RP 416. Sullivan did not even know Bohannon had been cut. RP 416, 428. Bohannon exclaimed, "You're F'ed, I'm a lawyer," and told Sullivan police were coming. RP 416.

Christopher Bohannon

Bohannon stated Sullivan had stayed with him off and on in October 2012. RP 120-22. On October 29, 2012, Sullivan introduced Bohannon to her daughter until the daughter's father came to pick her up. RP 129. Bohannon and Sullivan continued to hang out in Bohannon's apartment, drinking. RP 129.

Bohannon started to fall asleep on the couch close to midnight. RP 130. He heard the front door to his apartment close and "figured that

[Sullivan] had left for the night." RP 130. After Bohannon fell asleep, Sullivan woke him to ask if she could bring a friend into Bohannon's apartment. RP 131. Bohannon told Sullivan no, but Sullivan brought Cessill into the apartment anyway. RP 131. Bohannon awoke and he, Sullivan, and Cessill began to hang out. RP 131. Cessill became tired and began falling asleep; Cessill asked if he could stay the night in the apartment until he left in the morning to catch a flight. RP 131-32.

After Cessill fell asleep, Bohannon stated Sullivan asked to smoke some of Bohannon's medical marijuana. RP 133. Bohannon said no, explaining it was to be used only for his arm pain. RP 133.

According to Bohannon, Sullivan "just flipped out and got really upset, kind of like a tantrum. And then she got up and she said, Well, then I'm leaving and she got very upset." RP 133. Then Sullivan went to Cessill, tried to wake him, and pulled him off the couch. RP 134. Bohannon stated Sullivan told Cessill, "you're coming with me or I'm going to punch you in the face." RP 134.

Bohannon intervened, stating, "Nobody's going to hurt anybody. You're not going to punch anybody here. So I kind of got between them a little bit and . . . I asked her to leave at that point. I told her that she seems like she's getting very aggressive and I'd like her to leave." RP 135.

Bohannon and Sullivan proceeded to the front door of the apartment "but [Sullivan] ran across me the wrong way into the kitchen area." RP 135-36. "[W]hen she ran in to the kitchen, I came in there and she hit me in the nose a couple of times" with "[h]er fists." RP 136. Bohannon threw Sullivan to the ground at least twice. RP 136, 211. Bohannon stated Sullivan was on all fours and he was attempting to calm her dawn. RP 137. Sullivan was breathing heavily and according to Bohannon "clearly fe[lt] defensive in some kind of way or something." RP 138.

Sullivan, after having remained on the floor for 30 seconds to two minutes, "twirled around and got up and grabbed [Bohannon's] kitchen knife, [his] big one." RP 142. Bohannon grabbed at the knife, cutting his hand; Sullivan swung the knife, cutting Bohannon's forearm. RP 142-43, 145, 217-18.

Cessill came to Bohannon's rescue, coming "out of nowhere and pretty much grabbed her" and "pulled her backwards on to the couch" while Bohannon "went for the knife or her arm." RP 147. Sullivan passed out because Cessill had apparently placed Sullivan in a choke hold. RP 149, 151. Bohannon "grabbed all the other knives which are on the magnetic strip" "went to [his] bedroom and threw them on the other side of the bed just in case [Sullivan] did the same thing and ran back to get another knife or

something." RP 149. Bohannon then ran out of the apartment and called 911. RP 149-50.

In the middle of Bohannon's testimony, Juror 9 informed the court that he was fairly certain he knew Bohannon, believed they might be friends on social media, and also thought they had mutual friends. RP 167-69. Defense counsel moved to excuse the juror for cause, which the trial court denied. RP 172-73.

Robert Cessill

On October 29, 2012, Cessill was in Seattle during a lengthy layover on his way from Alaska to California. RP 347. He decided to go downtown rather than stay at the airport. RP 347.

When Cessill was barhopping, he met Sullivan, who invited him to her friend's house. RP 347. Cessill arrived at Bohannon's apartment and conversed with Bohannon about politics. RP 354. Cessill fell asleep on Bohannon's couch. RP 348.

Cessill stated he woke up to Sullivan standing over him. RP 348, 355. Cessill testified that Sullivan stated "I'm going to punch you in the face" or "I'm going to punch him in the fucking face." RP 348, 355. When Cessill opened his eyes, Sullivan told him that she needed to leave the apartment right now and that Cessill needed to "get the fuck out right now." RP 348, 356. Cessill said Bohannon then stated "Uh, actually, how about

you leave" to Sullivan. RP 348. Bohannon also reportedly told Sullivan to leave Cessill alone. RP 356.

Cessill testified Sullivan went to the kitchen and came out with a knife, swung the knife around, and cut Bohannon a couple times. RP 358, 366. Cessill testified Sullivan never hit Bohannon with her fists. RP 360.

According to Cessill, "it took kind of a few seconds to, like, realize what was going on . . . . [W]hen I gauged the situation I guess I just got up and put her in the rear naked choke" which is "a choke hold that is typically used in jujitsu as a submission move around -- underneath the neck, arm and your bicep." RP 369. According to Cessill, Sullivan lost consciousness, dropping the knife. RP 370.

At that point Bohannon went to the kitchen "real quick and grabbed the rest of his kitchen knives and hid them and then ran out the door on his phone." RP 370. Sullivan regained consciousness, looked for her items, and left. Cessill testified that before she left, Sullivan told Cessill he was cute. RP 371-72. Cessill spoke to police and provided them with a summary of what happened. RP 372.

In light of the differing versions of events, the trial court instructed the jury on self defense. CP 41-44. Over defense objection, the trial court included an initial aggressor instruction, which stated in part, "if you find beyond a reasonable doubt that the defendant was the aggressor, and that

defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense." CP 40; 493-98, 517.

As part of the self defense instructions, defense counsel, based on this court's decision in State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000), proposed the instruction,

> two or more people are more likely to inflict injury than only one such person, the amount of force that is necessary to prevent the infliction of injury, and thus is not unlawful, may vary with the number of persons the defendant reasonably believes are about to commit or assist in an offense against a person.

CP 75; RP 485-86. Despite it being a correct statement of the law, and supported by Sullivan's testimony, the trial court refused to give this instruction. CP 486.

During closing, the State argued,

> According to defendant's versions of events, [Cissell]'s kind of routed up on the couch, and then he notices that Ms. Sullivan and [Bohannon] have fallen to the ground. So, according to Ms. Sullivan, he apparently just kind of jumps in and starts grabbing her body? And why does she [say] grabbing her body? Because she wants to have the strongest emotional reaction to you because we all realize that any kind of sexual assault is heinous and . . . she wants us to have that reaction.

RP 543-44. However, Sullivan never testified or indicated in any way that she feared or believed she was experiencing a sexual assault during the physical altercation between herself, Bohannon, and Cessill. Indeed, no evidence of sexual assault, perceived or actual, appears in the record at all.

The jury found Sullivan guilty of second degree assault. CP 23; RP 592-95. The jury also returned a special verdict that Sullivan was armed with a deadly weapon when she committed the second degree assault. CP 22; RP 593-95.

The trial court imposed an exceptional sentence downward of zero months for the second degree assault based on RCW 9.94A.535(1)(a), which establishes a mitigating circumstance when "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." CP 98, 112-14; RP 619. For the deadly weapon enhancement, the trial court imposed a 12-month sentence. CP 98; RP 620. The trial court credited Sullivan's time spent in King County Community Center for Alternative Programs against the 12-month sentence for the deadly weapon enhancement. CP 98; RP 620, 623.

This timely appeal follows. CP 103.

C. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO EXCUSE A JUROR ACQUAINTED WITH THE COMPLAINING WITNESS DENIED SULLIVAN THE RIGHT TO AN IMPARTIAL JURY

"Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury." State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). Under RCW

2.36.110, the trial court must dismiss a juror "who . . . has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." Any party has the right to challenge a juror for cause. CrR 6.4(c).

"Actual bias" means "the existence of a state of mind on the part of the juror in reference . . . to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging . . . ." RCW 4.44.170(2). "The question for the judge is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." Hough v. Stockbridge, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009). The trial court's decision to remove or retain a juror is reviewed for abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000).

In the midst of Bohannon's lengthy trial testimony, Juror 9 brought to the court's attention that he was acquainted with Bohannon: "When I saw him, it . . . became apparent to me that I'm reasonably confident I have met him before, and I believe we have mutual friends in common . . . . I can't recall actually having a conversation with him." RP 166. Juror 9 stated he and Bohannon "may be friends on social media" and "seeing [Bohannon] and hearing him talk it seemed to become perfectly clear that I may know

him and there may be some connection through social media." RP 166. Upon defense counsel's questioning, Juror 9 stated Bohannon "looked familiar and then when he started talking. The voice and the face I remembered seeing." RP 169. Juror 9 also indicated "I feel like we were introduced," and noted he met a lot of people through his political work. RP 170. Juror 9 explained that, per the court's instructions not to "do any research on people," he did not confirm he and Bohannon were acquainted through social media or otherwise. RP 167, 169. In response to the prosecutor's questions, Juror 9 stated he did not believe his familiarity with Bohannon would affect his assessment of Bohannon's credibility. RP 168.

Following questioning, defense counsel requested that the court excuse Juror 9. RP 173. The trial court denied this request: "I'm not excusing anybody on the off chance that they now maybe met somebody in an inconsequential meeting because he doesn't remember if, if he actually met him, and he doesn't even know if it's the same person." RP 173.

Here, Juror 9 stated he was confident he had met Bohannon, believed they had mutual friends, recognized both Bohannon's voice and face, and also thought they were friends on social media. Although Juror 9 stated his familiarity with Bohannon would not affect his assessment of Bohannon's credibility, his immediate recognition of Bohannon as someone he has met and as a possible social media friend suggests otherwise. Juror 9, having

recognized Bohannon, would naturally have felt an affinity for Bohannon's story. Moreover, Juror 9's belief that he knew Bohannon from being introduced through political work was bolstered by Cessill's repeated testimony that Bohannon was "pretty politically informed" and that they had good conversation about politics. RP 347, 353. Based on being acquainted with Bohannon, Juror 9 would have given undue credence to Bohannon's version of events and his social media friendship and friendships in common placed additional pressure to find Sullivan guilty. The trial court erred by refusing to excuse Juror 9 for actual bias.

When the trial court should have excused a juror for cause and this juror remains and deliberates to a guilty verdict, the remedy is a new trial. State v. Birch, 151 Wn. App. 504, 512, 213 P.3d 63 (2009). This court should accordingly reverse and remand for retrial.

2. THE TRIAL COURT'S ERRONEOUS FIRST AGGRESSOR INSTRUCTION REQUIRES REVERSAL

The trial court instructed the jury on self defense. CP 41-44; RP 529-30. The court also gave a first aggressor instruction:

> No person may, by any intentional violent act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 40; RP 529. Defense counsel objected to this instruction. RP 497, 517.

Washington courts disfavor aggressor instructions. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), overruled on other grounds as stated in In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Aggressor instructions make self defense claims more burdensome, which is counterintuitive because the State bears the burden of disproving self defense beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). "Few situations come to mind where the necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

This case did not present a situation warranting an aggressor instruction. By giving the aggressor instruction, the jury was permitted to conclude Sullivan was the first aggressor because she became enraged and engaged in assaultive conduct. But the act of aggression justifying the instruction cannot be the charged assault itself. Nor can words alone qualify as an act of first aggression. Because the evidence did not support an aggressor instruction, reversal is required.

a. The aggressor instruction was erroneous because the assault itself cannot form the evidentiary basis for an aggressor instruction

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act

is entitled to respond with lawful force." Riley, 137 Wn.2d at 912. Courts should give an aggressor instruction only where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. Id. at 909-10. Whether the evidence was sufficient to support the giving of an aggressor instruction is a question of law reviewed de novo. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). "The provoking act cannot be the actual assault." Id. (citing State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)).

Here, there was no aggressive act—other than the assault itself or Sullivan's mere words—that provoked a belligerent response. Bohannon testified Sullivan appeared to be leaving Bohannon's apartment but suddenly ran toward the kitchen area. RP 135-36. Bohannon stated, "when she ran in to the kitchen, I came in there and she hit me in the nose a couple times" with "[h]er fists." RP 136. Bohannon continued, "she kept coming after me to hit me. And she got a couple good ones in on my nose . . . ."[1] RP 136. Bohannon then "grabbed her when she was coming after me . . . grabbed her arms and pulled her down to the floor." RP 136. Bohannon proceeded to put his hand on Sullivan's back, "kind of like just stay there or if she tried to get up, [Bohannon] would push her back down or something." RP 136-37.

[1] Bohannon was the only witness who said Sullivan punched him. RP 360 (Cessill testifying Sullivan never hit Bohannon); RP 464 (Sullivan testifying she never punched Bohannon).

Bohannon testified he "threw [Sullivan] on the ground twice." RP 211. Bohannon said he was trying to calm Sullivan down, and that Sullivan "didn't do anything for quite a long time. I can't tell you how long, whether it's 30 seconds or a minute or two minutes, it felt like forever." RP 141-42. Then, according to Bohannon, Sullivan "twirled around and got up and grabbed my kitchen knife, my big one." RP 142. "And then . . . moments later [Sullivan] cut [Bohannon] in [his] wrist." RP 142.

This evidence did not support the aggressor instruction. Sullivan's alleged assaultive actions towards Bohannon constituted a single course of conduct culminating in the knife cut. This single course of conduct cannot be considered the intentional act provoking a belligerent response entitling the State to an aggressor instruction because the provocative act must be an act separate and apart from the assault itself. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

Analysis of when assaultive acts constitute one course of conduct and therefore one assault "is highly dependent on the facts." State v. Villanueva Gonzalez, 180 Wn.2d 975, 985, 329 P.3d 78 (2014). Courts consider the following nonexclusive factors as part of this analysis: "The length of time over which the assaultive acts took place," "[w]hether the assaultive acts took place in the same location," [t]he defendant's intent or

motivation for the different assaultive acts," "[w]hether the acts were uninterrupted or whether there were any intervening acts or events," and "[w]hether there was an opportunity for the defendant to reconsider his or her actions." Id.; see also State v. Rodriquez, 187 Wn. App. 922, 937, 352 P.3d 200 (2015) ("Evidence that multiple acts were intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct. Courts also consider whether the conduct occurred at different times and places or against different victims." (citation omitted)).

Sullivan's alleged assaultive actions constituted one course of conduct. Sullivan's alleged punching and knife grabbing occurred in the same location—the kitchen area of Bohannon's apartment. The punching and knife grabbing acts occurred within a two-minute timeframe at most. See RP 141-42 ("Whether it's 30 seconds or a minute or two minutes, it felt like forever."). Sullivan perpetrated these alleged assaultive acts against Bohannon alone, and the record discloses no act that interrupted or intervened between Sullivan's alleged punches and her grabbing of the knife. While Bohannon testified that Sullivan might have stayed on all fours for some period of time after he twice threw her to the ground, no evidence suggests that Sullivan's punching and knife grabbing were driven by different intentions or motivations, or that she had an opportunity to

reconsider her actions. Indeed, Bohannon testified that though he was trying to calm Sullivan, she "was just breathing heavily" during this period and "clearly fe[lt] defensive in some kind of way or something." RP 137-38. Based on the Villanueva Gonzalez factors, Sullivan's alleged assaultive acts constituted a single course of conduct. Because Sullivan's alleged conduct constituted a single, continuous assault, none of her actions qualifies as an act of first aggression. Bea, 162 Wn. App. at 577; Wasson, 54 Wn. App. at 159; Brower, 43 Wn. App. at 902. The aggressor instruction was error.

b. Words alone cannot provoke a belligerent response and therefore cannot support an aggressor instruction

Sullivan's words during the incident were not sufficient to justify the aggressor instruction. Sullivan allegedly threatened to punch Cessill if Cessill did not leave Bohannon's apartment with her. RP 134, 348, 355-56. Sullivan never punched Cessill, however. RP 136. "[W]ords alone do not constitute sufficient provocation" to warrant an aggressor instruction. Riley, 137 Wn.2d at 911. If words by themselves were sufficient to justify use of force, the "victim" could respond to words with force and the speaker could not thereafter lawfully defend herself. Id. at 911-12. Accordingly, Sullivan's alleged threats to punch Cessill were not sufficiently provocative to warrant the aggressor instruction.

c. The court's instruction requiring "intentional violent acts" was misleading and overly vague

The aggressor instruction the trial court gave is reversible error for another reason: even assuming there was *some* conduct separate from the charged assault that warranted an aggressor instruction, it was impermissibly vague with respect to the act that qualified as the act of first aggression. Aggressor instructions may not be too vague or too broad. Arthur, 42 Wn. App. at 124. Rather, "[a]n aggressor instruction must be directed to intentional acts which the jury could reasonably assume would provoke a belligerent response by the victim." Id.

In Arthur, this court considered an aggressor instruction that read, "No person may by any unlawful act create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person." Id. at 121. This court indicated that the term, "unlawful act" "requires us to speculate and conjecture as to which act of the defendant might have been characterized by the jury as 'unlawful.'" Id. at 122. This court determined the "instruction is too vague and too broad" because the jury could have concluded that Arthur's accidental collision with the victim's car was the act provoking a belligerent response. Id. at 124. This court confirmed that aggressor instructions "must be directed to intentional acts," rather than accidental acts, "which the jury could reasonably assume

would provoke a belligerent response by the victim." Id. Because the instruction at issue in Arthur failed to do so, this court reversed. Id. at 124-25.

The trial court's instruction referring to "any intentional violent act" suffers from a similar infirmity as the instruction at issue in Arthur. See CP 40 ("No person may, by any intentional violent act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person."). The trial court did not specify or direct the jury to which "intentional violent" act or acts qualified as acts of first aggression. The jury could have concluded that Sullivan's alleged threat to punch Cessill was such an intentional violent act. The jury could have determined Sullivan's alleged punches to Bohannon's nose were the provocative intentional violent acts. Or the jury could have decided the slashing of Bohannon's forearm with a knife was the intentional violent act that provoked a belligerent response. As discussed, none of these acts could qualify as the provoking act as the assault itself cannot be the provoking act and words alone are insufficient to incite a belligerent response. Thus, as in Arthur, without any parameters or guidance to determine what the "intentional violent act" was, the aggressor instruction was "too vague and too broad." Arthur, 42 Wn. App. at 124.

It is telling, moreover, that the prosecution failed to point to a specific intentional violent act that was reasonably likely to provoke a belligerent response during closing argument. The prosecutor did not once mention Sullivan's alleged punches to Bohannon's nose. The State instead focused on Sullivan's alleged threat to punch Cessill and repeatedly characterized Sullivan as "throwing a tantrum" and going "berserk." See, e.g., RP 535, 546, 549, 584. These arguments erroneously invited the jury to conclude that threats to Cessill, going berserk, and having a tantrum were the intentional violent acts of provocation. The State's failure to point to any evidence of a specific provocative act demonstrates that there was none. Even if there had been, however, the instruction was impermissibly vague because it did not identify such an act for jurors. The aggressor instruction was given in error.

d. The erroneous aggressor instruction is a prejudicial constitutional error that requires reversal

The error in giving an aggressor instruction is constitutional in nature and must be deemed prejudicial unless the State proves the error was harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473; State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433 (2010).

The State cannot show harmlessness. An improper aggressor instruction is prejudicial because it eviscerates a self defense claim. Birnel,

89 Wn. App. at 473; Brower, 43 Wn. App. at 902. The first aggressor instruction negated Sullivan's self defense claim, improperly removing it from the jury's consideration. Evidence showed that Sullivan had good reason to fear violence. Indeed, even the complaining witness described Sullivan as "clearly feel[ing] defensive." RP 138. Sullivan testified that, in response to calling Bohannon "greedy, selfish, and controlling," Bohannon became enraged and physically attacked her. RP 412-13. Sullivan described her and Bohannon "rolling around on the floor" when Cessill also jumped on top of her. RP 414-15. Sullivan explained she was fearful and felt the need to protect herself from harm by grabbing the knife. RP 415-16, 426-27. The jury may have believed Sullivan acted in self defense, but nonetheless was forced to conclude from the aggressor instruction that it could not acquit her because of her alleged threat to Cessill and alleged punches to Bohannon's nose. The aggressor instruction erroneously precluded Sullivan's self defense claim.

The trial court instructed that "self-defense is not available as a defense" if Sullivan was the first aggressor. CP 40. But the trial court did so without supporting evidence to justify giving the aggressor instruction, thereby preventing Sullivan from fully asserting her self defense theory. E.g., Stark, 158 Wn. App. at 960-61 ("[W]ithout supporting evidence to justify giving the aggressor instruction, the court prevented Ms. Stark from

fully asserting her self-defense theory."); Wasson, 54 Wn. App. at 160 (unjustified aggressor instruction "effectively deprived Mr. Wasson of his ability to claim self-defense"); Arthur, 42 Wn. App. at 124-25 (without directing jury to intentional acts "which the jury could reasonably assume would provoke a belligerent response," the aggressor instruction "effectively vitiated any claim of self-defense to be considered by the jury"). The aggressor instruction relieved the State of its burden of proving lack of self defense beyond a reasonable doubt. This error requires reversal of the second degree assault conviction and remand for a new trial.

3. IT WAS ERROR TO DENY THE DEFENSE PROPOSED INSTRUCTION THAT THE AMOUNT OF FORCE REASONABLY NECESSARY MAY INCREASE WITH THE NUMBER OF PERSONS AGAINST WHOM SUCH FORCE IS USED

The trial court refused to give Sullivan's proposed instruction that "the amount of force that is necessary to prevent the infliction of injury . . . may vary with the number of persons the defendant reasonably believes are about to commit or assist in an offense against a person." CP 75; RP 486. Because this instruction is a correct statement of the law and because it was necessary for Sullivan to argue greater force was reasonably necessary to defend herself against both Bohannon and Cessill, the trial court's refusal to provide this instruction was error.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." Irons, 101 Wn. App. at 549. "'Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.'" Id. (quoting State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)). "'Failure to give such instructions is prejudicial error.'" Id. (quoting Riley, 137 Wn.2d at 908 n.1).

In determining whether substantial evidence supports a jury instruction proposed by the defense, the trial court must interpret the evidence "most strongly" in the defendant's favor and "must not weigh the proof, which is an exclusive jury function." State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005). The refusal to give a defense-proposed instruction is reviewed de novo. Id. at 562.

Based on this court's decision in Irons, defense counsel proposed the following instruction:

> As it is within the realm of common experience that two or more people are more likely to inflict injury than only one such person, the amount of force that is necessary to prevent the infliction of injury, and thus is not unlawful, may vary with the number of persons the defendant reasonably believes are about to commit or assist in an offense against a person.

CP 75. Defense counsel requested this instruction "to go along with the lawful use of force instruction . . . it's obviously the state of the law such that the amount of force necessary is going to vary depending on how many people are being characterized as an aggressor." RP 485-86. Counsel also stated the Irons instruction "does add information to the jury as far as the fact that what's necessary is going to vary depending on how many aggressors there are." RP 486.

Defense counsel was correct in light of Irons and State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998). At issue in both cases was whether WPIC 16.02 and WPIC 16.07,[2] when used together to instruct the jury on self defense, make the legal standard for self-defense manifestly clear where a defendant has been threatened by multiple assailants.

Hutchinson shot two police officers, both of whom he claimed were assaulting him. Hutchison, 135 Wn.2d at 868. The State charged Hutchison with two counts of aggravated first degree murder, one count for each officer. Id. at 867, 869. The Washington Supreme Court acknowledged it had "recently held the pattern jury instruction [WPIC 16.02] is ambiguous and could lead the jury to believe there must actually be an imminent danger of harm, rather than a reasonable belief that such danger exists." Id. at 884

[2] Both WPIC 16.02 and WPIC 16.07 were used in Sullivan's case. CP 41 (Instruction 15; standard use-of-force instruction); CP 44 (Instruction 17A; person entitled to act on appearances in defending herself).

(citing State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996)). However, "[u]nlike LeFaber . . . the trial court gave an additional instruction [WPIC 16.07] which clarified any ambiguity created by [WPIC 16.02]," as it instructed the defendant '"has the right to defend himself by the use of lawful force . . . *even if he is not actually in such danger*."' Id. (quoting clerk's papers). Thus, the Hutchinson court held that when read together WPIC 16.02 and WPIC 16.07 "adequately conveyed the law of self-defense to the jury in this case. While [WPIC 16.02] could have been interpreted to require actual imminent danger, [WPIC 16.07] explicitly informed the jury the Defendant was entitled to act on appearances and the actual danger was not required." Id. at 885.

In Irons, this court acknowledged Hutchinson's holding, but distinguished Hutchinson based on the facts:

> But in contrast to the facts involved in Hutchinson, i.e., one defendant maintaining he was assaulted by both of his victims, the record in the present case indicates that Irons was surrounded by four men, three of whom intended to assist the fourth in confronting Irons, and that one of these men—not the victim—threatened Irons with a beer bottle. Although these instructions make the legal standard for self-defense manifestly clear where a defendant has been threatened by his or her victim or victims, Irons contends that the trial court's instructions inadequately conveyed the law of self-defense to the jury under the facts of his case because they did not make it manifestly clear to the jury that it could consider the fact that Irons was faced with multiple assailants. We agree.

Id. at 552 (citation and internal quotation marks omitted). Although the jury was instructed to take '"into consideration all the facts and circumstances as they appeared to [the defendant],'" "the problem arises after considering the additional language requiring that 'the defendant reasonably believed that *the victim* intended to . . . inflict death or great personal injury; and . . . the defendant reasonably believed that there was imminent danger of such harm being accomplished."' Id. (alterations in original) (quoting clerk's papers). Because the instructional language required the "jury to consider only the actions and intentions of *the victim* in assessing Irons's reasonable belief," in multiple assailant cases "this language can easily be read to modify the portion of the charge that instructs the jury to consider *all facts and circumstances* as they appeared to the defendant." Id. at 552-53. Therefore, "in a case involving multiple assailants who were acting in concert with the victim, these jury instructions become internally inconsistent and therefore, ambiguous." Id. at 553.

This court also provided a detailed analysis of other Washington and out-of-state cases, concluding that '"the number of persons who reasonably appeared to have been a threat to the defendant[] should be considered by the jury in determining whether the defendant's use of force was necessary and reasonable."' Id. at 553-58 (quoting People v. Cuevas, 740 P.2d 25, 27 (Colo. App. 1987)). Because it is "within the realm of common experience"

that multiple persons are more likely to inflict injury than only one person, "the amount of force that is necessary to prevent the infliction of great personal injury may vary with the number of persons the defendant reasonably believes" are about to injure her. Id. at 558.

Irons's holding and rationale compel reversal here. Sullivan's theory was that both Bohannon and Cessill attacked her, reasonably necessitating her greater use of force. See RP 414-45, 444-45, 485-86. But the use-of-force-instruction provided,

> The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

CP 41 (Instruction 15).

This instruction presents the same problem as that in Irons. The instruction in Irons was that "the defendant reasonably believed that *the victim* intended" to inflict great bodily injury. Irons, 101 Wn. App. at 552. This instruction was impermissibly ambiguous because it could be read to "require[] the jury to consider only the actions and intentions of *the victim* in assessing Irons's reasonable belief." Id. Although it did not reference "the victim," the jury instructions in this case indicated Sullivan, if she reasonably believed she was about to be injured, could lawfully use force against "the

person of another." CP 41. As in Irons, the instruction is incomplete and therefore ambiguous because the jury could reasonably read "upon the person of another" as a requirement to consider the reasonableness of Sullivan's use of force only in light of Bohannon's actions—*the person* against whom she used force—and otherwise feel compelled to disregard Cessill's actions in this determination. Because Sullivan's theory was that she reasonably needed to use a greater amount force to repel both Bohannon's and Cessill's attacks, the trial court erred in refusing to instruct the jury that the number of persons who reasonably appeared to threaten her should be considered in deciding whether her use of force was reasonably necessary.

In response, the State might argue that the instructions still allowed Sullivan to argue her theory of the case and that Sullivan actually did so. E.g., RP 569-70 ("[Y]ou have two intoxicated men on top of a smaller person, unexpectedly in a context that makes no sense at the time. It is reasonable to believe that you're going to get hurt in trying to get these people off of you, especially when [they're] not getting off of you at the time you're trying to escape."). But the law requires more. Merely allowing Sullivan to argue her theory still "left [her] with the burden of overcoming the inconsistency between the instruction as written and [her] theory that [s]he reasonably believed [s]he was in imminent danger of . . . injury from

multiple[] assailants—not just [Bohannon]." Irons, 101 Wn. App. at 559. "'The defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is.'" LeFaber, 128 Wn.2d at 903 (quoting State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984)); see also CP 27 (instructing jury to disregard an attorney's "remark, statement, or argument that is not supported by . . . the law in my instructions.").

As in Irons, the inconsistency in the jury instructions was a misstatement of the law, which is "presumed to have misled the jury in a manner prejudicial to the defendant unless the error can be declared harmless beyond a reasonable doubt." Irons, 101 Wn.2d at 559. Both Sullivan and Cessill testified that Cessill assisted Bohannon in a physical altercation with Sullivan in Bohannon's apartment. RP 348, 414-15, 445-46. But the inconsistency in the use-of-force instruction may have precluded jurors from considering Cessill's actions in determining whether Sullivan reasonably used force. The outcome of Sullivan's trial might well have differed had the jury been correctly instructed that the amount of force necessary to prevent injury increases to correspond to the number of persons the defendant reasonably believes are about to injure her. The instructional error was not harmless. This court should reverse and remand for a new trial at which the jury is properly instructed on self defense.

4. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DEPRIVED SULLIVAN OF A FAIR TRIAL

"Mere appeals to the jury's passion or prejudice are improper." State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). The prosecutor has a quasi judicial duty to "ensure a verdict free of prejudice and based on reason." State v. Kroll, 87 Wn.2d 829, 835-36, 558 P.2d 173 (1977); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984).

While "the State has wide latitude to argue inferences from the evidence," "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). "This rule is closely related to the rule against pure appeals to passion and prejudice because appeals to the jury's passion and prejudice are often based on matters outside the record." Id.

When, as here, the defense fails to object to improper comments at trial, the misconduct is reversible error if the prosecutor's comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). "The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks." Pierce, 169 Wn. App. at 552 (citing Emery, 174 Wn.2d at 761-

62). Arguments creating an inflammatory effect on the jury are generally not capable of instructional cure. Emery, 174 Wn.2d at 763; State v. Perry, 24 Wn.2d 764, 770, 167 P.2d 173 (1946).

In closing, the State argued that jurors should disbelieve Sullivan because she was feigning a sexual assault:

> According to defendant's versions of events, [Cessill]'s kind of rousted up on the couch, and then he notices that Ms. Sullivan and [Bohannon] have fallen to the ground. So, according to Ms. Sullivan, he apparently just kind of jumps in and starts grabbing her body? And why does she [say] grabbing her body? Because she wants to have the strongest emotional reaction to you because we all realize that any kind of sexual assault is heinous and . . . she wants us to have that reaction.

RP 543-44. Not only was this appeal to the jurors' passions and prejudices misogynistic, it was also wholly unsupported by any evidence adduced at trial.

Sullivan testified she was "terrified" to realize that not only Bohannon was "on top of" her as they were rolling around on the ground but that Cessill was also on top of her, hurting her. RP 414-15. She stated, "And I was scared and people were putting their hands on my body and holding me against my will for no reason." RP 415. On cross examination, the prosecutor asked, "And you said that they were grabbing at your body," to which Sullivan responded, "I don't know how to use my words other than that way." RP 432.

Nothing in Sullivan's testimony remotely indicated she feared sexual assault or believed she was defending herself against a sexual assault. She testified two men were on top of her as they all wrestled on the ground. While Sullivan said they were putting their hands on her body and holding her against her will, this testimony cannot be fairly construed to suggest Sullivan believed they were sexually assaulting her or were about to do so. Sexual assault was a figment of the prosecutor's skewed imagination; as such the prosecutor's argument was not grounded in any evidence.[3]

The prosecutor employed this improper and unsupported emotional appeal to destroy Sullivan's credibility. During closing the prosecutor repeatedly emphasized that the case came down to the jury's determination of credibility. See, e.g., RP 542 ("But ultimately this case boils down to credibility."); RP 543 ("You're [the] sole judge of credibility."); RP 549

[3] Oddly, this was not the only time during Sullivan's trial that this prosecutor wholly fabricated an issue of sexual assault. Sullivan testified she once had had sex with Bohannon after which she "woke up cuddled with him on the couch, half dressed, and I wasn't sure what happened because we were pretty drunk the night before. And he's the one who informed that we had -- had sex. And I just kind of pretended it never happened and let it go." RP 398-99. Sullivan stated she was not romantically interested in Bohannon. RP 399. Outside the jury's presence, the State objected to the defense's alleged elicitation of ER 404(b) evidence: "a prior rape is clearly 404(b), or an insinuation that there was a prior rape, which is what Ms. Sullivan just talked about, that she woke up, half naked, not having consented to the sex and told that she had had sex." RP 417-18. The State could not "see how a prior allegation of -- or what's really an allegation of rape could not be construed as clearly a prior bad act" of Bohannon. RP 418. The trial court stated, "I'm not sure that this would be considered rape," and overruled the State's objection. RP 419. This demonstrated the prosecutor's eagerness to characterize Sullivan as someone who falsely reported sexual assault to obtain advantage, foreshadowing his improper closing argument.

("Then you saw her telling her story. And . . . you know, ultimately it's up to you whether you find it credible . . . ."); RP 549 ("Now, I'd submit to you that, really, in this case, the real question is credibility, right?"); RP 552 ("But ultimately in this particular case this comes down to your determination of credibility. You saw the witnesses. The purpose of this whole system is that we have individuals like yourself to just assess people's credibility.").

Because the case came down to a credibility contest between competing versions of events, the State opted to impugn Sullivan's version by arguing she should not be believed because she was trying to pass herself off as a victim of sexual assault. The State's argument that jurors should not believe Sullivan because she was crying rape was highly inflammatory and encouraged jurors to base their verdict on the repugnancy of falsely reporting sexual assault rather than on the evidence. None of the trial testimony remotely supported the State's improper arguments to the jury's passion and prejudice. The State's improper emotional appeal to jurors to decide this case on evidence outside the record was reversible misconduct. Pierce, 169 Wn. App. at 553.

Prosecutors know that appeals to passions and prejudices of jurors—such as by falsely and flagrantly characterizing defendants of feigning rape—are improper. See In re Pers. Restraint of Glasmann, 175 Wn.2d 696,

707, 286 P.3d 673 (2012) (holding prosecutor's misconduct was flagrant and ill intentioned given that "[t]he case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here"). Prosecutors also know that urging jurors to decide cases based on evidence not adduced at trial is improper. See id. Thus, although defense counsel failed to object, it is flagrant and ill-intentioned misconduct for prosecutors to make highly inflammatory extra-evidentiary appeals to the passions and prejudices of jurors. Arguments intended to create and that actually do create an inflammatory effect on the jury are, in general, incapable of being cured by instruction. Emery, 174 Wn.2d at 763; Perry, 24 Wn.2d at 770. This court should hold that the prosecutor's inflammatory argument to jurors not to believe Sullivan because she was attempting to deceive jurors into believing she feared a sexual assault was flagrant, ill-intentioned misconduct that requires reversal and a new trial.

5. THIS COURT SHOULD EMBRACE AND EXERCISE ITS DISCRETION TO DECLINE THE IMPOSITION OF APPELLATE COSTS AND SO STATE IN ITS DECISION TERMINATING REVIEW

In the event this court erroneously affirms Sullivan's conviction, it should exercise discretion and decline to impose appellate costs. Sullivan is indigent and cannot pay appellate costs, the unjust consequences of forcing indigent persons to pay superior court costs elucidated in State v. Blazina,

182 Wn.2d 827, 344 P.3d 680 (2015), are every bit as unjust in the context of appellate costs, there is no rational basis to impose costs on persons who cannot pay them, and this court has ample discretion not to impose such costs.[4]

The State charged Sullivan with a felony and a public defender was appointed to assist her based on her indigency. At all times during the superior court proceedings and proceedings in this court, Sullivan has been represented by court-appointed counsel because she meets the indigency standards under chapter 10.101 RCW and title 15 RAP. CP 115-16 (order authorizing appeal in forma pauperis). Given Sullivan's indigence, Sullivan should not be required to pay appellate costs if the State substantially prevails on appeal.

[4] This court's commissioners have refused to exercise any discretion with regard to appellate costs when the issue is raised in a post-decision objection to cost bill. In so refusing, they have referenced RAP 14.2, which reads in part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." In State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000), the court stated RAP 14.2 "appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision." If this is so, the only mechanism available to avoid the imposition of appellate costs is assigning contingent error to the imposition of appellate costs to enable this court to direct that costs not be imposed in its decision terminating review.

a. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this court should accordingly exercise its discretion to deny appellate costs in the cases of indigent appellants

The Blazina court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. 182 Wn.2d at 836-37. LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. at 836. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclus.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASH. STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

While the Blazina court addressed trial court LFOs, the "problematic consequences" of trial court LFOs are every bit as problematic in the context of appellate costs. The appellate cost bill, which generally totals thousands of dollars, imposes a debt for not prevailing on appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). This debt results in the same compounding of interest and prolonged retention of court jurisdiction. Appellate costs negatively impact indigent persons' ability to move on with their lives in precisely the same ways the Blazina court identified.

Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right

"Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also stated, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839.

This court receives orders of indigency "as part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added). "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). If this court errs by affirming, this court should nonetheless embrace and soundly exercise its discretion by denying the award of any appellate costs in its decision terminating review in light of the serious concerns recognized in Blazina.

b. Imposing costs on indigent persons without assessing whether they have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are

constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. Johnson v. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id. Although this is a deferential standard, it is not meaningless. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (cautioning rational basis standard "is not a toothless one").

The vast majority of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.[5]

[5] It is by no means clear that the appellate cost system produces a net positive balance in the state's coffers. It is likely that enforcement efforts—if fairly quantified to include the time that trial and appellate lawyers, clerks, commissioners, and judges spend on these issues—would exceed the limited sums extracted from indigent persons.

As the Washington Supreme Court recently recognized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Imposing appellate costs under RCW 10.73.160 and RAP 14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants: "The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents of another person legally obligated to support a juvenile offender to pay appellate costs." RCW 10.73.160(1) (emphasis added). "The authority is permissive as the statute specifically indicates." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination *before* imposing costs to comport with the due process clauses.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. Blazina, 182 Wn.2d at 836-37. As discussed, appellate costs immediately begin accruing interest at 12 percent, making this reentry unduly onerous, if not

impossible, to achieve. See id.; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs under title 14 RAP and RCW 10.73.160 does not rationally relate to the state's interest in funding indigent defense programs. In the unlikely event the issue arises, Sullivan asks this court to conclude, in its decision terminating review, that any imposition of appellate costs without a preimposition determination of her ability to pay would violate her substantive due process rights.

c. Alternatively, this court should require superior court fact-finding to determine Sullivan's ability to pay

In the event his court wishes to impose appellate costs, it should first require a fair preimposition fact-finding hearing to determine whether she can pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. If it erroneously affirms and is inclined to impose appellate costs, this court should first direct the superior court to allow Sullivan to litigate her ability to pay before appellate costs are imposed.

If the State is able to overcome the presumption of continued indigence and support a factual finding that Sullivan has the ability to pay, the superior court could then fairly exercise its discretion to impose appellate costs depending on Sullivan's actual and documented ability to pay.[6]

Blazina signals that the time has come for Washington courts and prosecutors to stop punishing the poor for their poverty. Sullivan asks that this court deny all appellate costs or at least require the trial court on remand to conduct a fair fact-finding hearing to determine Sullivan's actual ability to pay appellate costs.

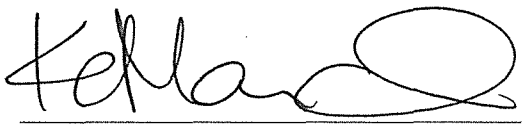
D. CONCLUSION

Juror bias, erroneous and incomplete self defense instructions, and prosecutorial misconduct rendered Sullivan's trial unfair. Sullivan asks that this court reverse her conviction and remand for a new and fair trial.

DATED this 26th day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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[6] The trial court here declined to impose any discretionary costs associated with trial. CP 97; RP 622.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 73217-0-I
DAWN SULLIVAN,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF OCTOBER, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAWN SULLIVAN
C/O SEATTLE MENTAL HEALTH
1600 E. OLIVE STREET
SEATTLE, WA 98122

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF OCTOBER, 2015.

X Patrick Mayovsky